No. 508.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

v.

INTERNATIONAL BUILDING COMPANY,
a Corporation.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For International Building Company.

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INDEX.

CITATIONS.

Cases:

Texts:

Rules:

Statute:

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OPINIONS BELOW.

The opinion of the District Court (R. 178-185) is reported in 97 F. Supp. 595. The opinion of the Court of Appeals, 8th Circuit (R. 206-224), is reported in 199 Fed. 2d 12.

JURISDICTION.

The jurisdiction of this court is admitted under 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

The Commissioner of Internal Revenue assessed deficiencies against taxpayer for the taxable years 1933, 1938 and 1939 determining that the basis of depreciation of its building was $385,000.00 [R. 44, 45, Stip. of Facts (a) and (b)]. Taxpayer filed petitions for review by the then Board of Tax Appeals, alleging in its petitions that the basis for depreciation was $860,000.00 [R. 45, Stip. of Fact (c)]. That was the only issue presented to the Board for its review and decision. Before the matter could be tried by the Board, the Commissioner and taxpayer filed stipulations with the Board that there was no tax liability for the years in question and that the assessments should be abated (R. 51, 53, Stip. Exhibit C, Exhibit D). Pursuant to the stipulations the Board entered its decision and judgment that there were no deficiencies for those years in question (R. 52, 54, Stip. of Fact. Exhibit C-1, Exhibit D-1). The question presented is whether these decisions and judgments entered by confession and consent are res adjudicata on the basis of depreciation and whether the United States is precluded by collateral estoppel from setting up in later taxable years that the basis of depreciation was $430,000.00 (R. 43, Stip. of Fact).

STATEMENT.

Due to certain pertinent omissions in the statement of the case set out in the brief for the United States, taxpayer will supply these omissions as briefly as possible. This was an action at law for the recovery of certain income taxes, declared value excess profit taxes, and excess

profit taxes paid by the taxpayer for the years 1943, 1944, and 1945 (R. 1 and 31). On December 27, 1905, the Liggett Realty Company leased to November Investment Company a plot of ground for 99 years, beginning January 1, 1906, and expiring December 31, 2004 (R. 34). A 17-story fire-proof office building was built thereon by the November Company during 1906 and 1907 at a cost of $575,000.00 (R. 37, Stip. of Fact). Subsequently, the November Investment Company sold the leasehold and building to West End Realty Company for $775,000.00 (R. 35 and 107, Stip. of Fact).

On April 14, 1913, the International Building Company was organized with a capital stock of $300,000.00, consisting of 6,000 shares of common stock, par value $50.00 per share, and purchased the leasehold and building from the then owner, Nina Realty Co., giving as consideration therefor all of its 6000 shares of common stock and $300,000.00 face value 6% first mortgage bonds secured by first mortgage on the building. The evidence showed that between 1907 and 1913, $165,000.00 had been expended in finishing the top eleven floors which were not finished when the building was originally completed (R. 119, Exhibit Z).

Beginning in 1920 taxpayer claimed a basis for depreciation of its building of $860,000.00 and made its depreciation deduction upon this basis for all years from 1920 through 1939. After 1939 taxpayer claimed an additional sum for depreciation of $10,383.00 for capital expenditures, as to which there is no dispute (R. 40), making a total basis for depreciation of $870,383. In making his assessment for additional taxes for the years 1943, 1944 and 1945, the Commissioner, in arriving at the depreciation basis set up by him of $430,000.00, estimated the reconstruction value May 1, 1913, then took its economic value over the life of the building, added the two values together and averaged that value for depreciation purposes at $430,000.00 and assessed deficiency taxes for those

years as noted above (R. 43, Stip. of Fact). These taxes were paid, claim for refund was filed, and refused, and this suit for recovery of taxes was instituted. Taxpayer alleged in this suit for recovery of taxes paid, the same allegations as to the basis of depreciation, $860,000.00 as was alleged in the petitions to the Board of Tax Appeals [R. 45, Stip. of Fact (c)]. It was stipulated that the issue involving valuation for depreciation purposes to be determined in the instant case was the same issue set forth in petitions to the Board of Tax Appeals except for different tax years (R. 45). The taxpayer further pleaded in its petition in the instant case that the basis of depreciation was res adjudicata by judgments of the Tax Court noted above, and that the United States was thereby estopped from assessing deficiency taxes based upon a depreciation basis of $430,000.00 (R. 7, 15, 17, 20). The District Court denied recovery holding that the decisions of the Tax Court were nothing more than an order confirming an agreement of counsel (R. 180). On appeal to the Court of Appeals, 8th Circuit, that court held that the judgments of the Tax Court were res adjudicata, reversed the cause and remanded it for further proceedings consistent with its opinion (R. 206-224). The Court of Appeals in its opinion carefully analyzed all of the cases cited by the United States in support of its position, which are the same cases cited by the United States to this Court, and a reading of that opinion will disclose the close and particular analysis of each and every case cited by the United States wherein the court distinguishes consent judgments on compromise settlements from the confession stipulations in the instant case.

SUMMARY OF ARGUMENT.

Where a consent judgment is entered by confession in the form of a stipulation on the sole issue in the case it is a bar by way of collateral estoppel in a subsequent action between the same parties upon the identical issue involved in the first proceeding. The entry of such a judgment is a judicial act upon the merits of the cause and is as effective as a judgment rendered after contest and as binding upon the parties, and it must be presumed that all matters of controversy between the parties were covered and disposed of by the stipulation and judgment. The United States cannot go behind the stipulation and pleadings with regard to an issue disclosed by the pleadings. If they had wished to relitigate this issue it should have been included as a part of the stipulation.

The stipulations entered into were not compromise stipulations but were confession stipulations of the only issue in the cause and when consent judgments are entered thereon each case must be studied to see whether the stipulation entered into is a compromise stipulation or a confession stipulation and the doctrine of res adjudicata applied accordingly. When the stipulation confessing judgment is entered into it thereby confesses every issue in the case and as there was only one issue in this case judgment was thereby confessed.

Consent judgments in previous cases between the same parties can not be collaterally attacked in a law action. They can only be attacked by a direct proceeding in equity.

Consent judgments entered into by stipulation are not contracts under the decisions of this court, and while the case at issue is for different tax years it involves the identical same issue as was previously adjudicated before the Tax Court between the same parties and is thereby res

adjudicata regardless of the fact that the claims involve different tax years.

With reference to the doctrine of res adjudicata, the public policy upon which the rule is founded applies with equal force to the sovereign and the claims of private citizens. An alteration of the law in this respect is a matter for Congress and not for the courts. Any contrary decision would overturn and hold for naught the numerous decisions of this court and lower courts on this most important question, and it would throw the doors open to countless thousands of cases of redundant litigation which the parties had heretofore deemed forever settled and judicially determined.

Various cases upon this point were carefully analyzed in detail by the Court of Appeals and therefore its judgment should be affirmed.

ARGUMENT.

I.

The Decisions and Judgment of the Tax Court Are Res Adjudicata on the Basis of Depreciation by Virtue of the Consent Judgments Entered by That Court and Thereby the Government Is Collaterally Estopped From Setting Up a Lower Basis of Depreciation.

The sole and single issue in the cases before the tax court was the basis of depreciation. The same identical issue between the same parties is the issue in the instant case. The United States has admitted this fact in the stipulation of facts filed in the District Court below (R. 45). Upon the basis of stipulations filed in the tax court that the assessments were to be abated, the tax court entered its decision and judgment that there were no deficiencies in income tax for the years in question (Record 51, 52, 53, 54, Exhibits C, C-1, D, D-1). Thereby there was a judgment on the merits by the tax court by confession and by consent by admitting that there were no income taxes due for the years in question. It necessarily follows as a legal conclusive fact that the basis as alleged in taxpayer's appeals to the tax court were correct, and when such an issue has been decided that issue cannot again be relitigated subsequently in another court by the same parties. In **Tait v. Western Maryland Railway Co.**, 289 U. S. 620, 623, 624, 626, the court in dealing with this identical issue said:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. . . . The scheme of the revenue act is an imposition

> of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the Government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status."

Following this pronouncement, the court then continued on page 626 and stated:

> "The very right now contested arising out of the same facts appearing in this record was adjudged in the prior proceeding."

Subsequently, in **Commissioner v. Sunnen**, 333 U. S. 591, the court in discussing res adjudicata and collateral estoppel stated on page 598:

> "Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding . . ."

As the sole and single issue in the first proceeding is the same identical issue in the instant case, the United States is collaterally estopped from again litigating that issue. In the Sunnen case, the court analyzed in detail estoppel by judgment or collateral estoppel and went on to state that it operated in such cases to relieve the government and taxpayer of redundant litigation of the identical question, citing **Tait v. Western Maryland**, supra, and then went on to hold that the contracts being litigated in the Sunnen case were not the same contracts as had been decided upon in the previous case, and therefore res adjudicata did not apply. This ruling in the Sunnen case follows previous rulings in **Cromwell v. County of Sac**, 94 U. S. 351; **Southern Pacific Railway v. United States**, 168 U. S. 1, 48-54; **City of New Orleans v.**

Citizens' Bank of Louisiana, 167 U. S. 371, 395-400. In the City of New Orleans case, supra, the court said:

> "The estoppel extends to every material allegation or statement which having been made on one side and denied on the other was the issue in the cause and was determined therein."

There is no principle of law in our jurisprudence that is more inflexible than the above rule of law and just as applicable to tax cases as any other case.

II.

The Consent Judgments Entered Upon Stipulation of the Parties in the Tax Court on the Only Issue in the Causes Is a Judicial Act on the Merits and Operates as Res Adjudicata or as Collateral Estoppel to the Same Effect as a Judgment or Decree Rendered After Contest and Is Binding and Conclusive Upon the Parties.

The United States argues that because no evidence was received, no stipulation of facts entered, no briefs filed and no hearings held, that by reason of those facts, there was no judgment upon the merits. We cannot agree to this theory. On the contrary, common sense, reason and logic show the fallacy of such conclusion where the only issue in the case was the basis of depreciation and if there were no taxes due that constitutes an admission that the allegation for the basis of depreciation was correct because that was the reason that there was an appeal to the tax court.

In **American Woolen Co. v. United States**, 18 F. Supp. 783, 788, 799, motion for new trial overruled 21 F. Supp. 125 (Court of Claims), certiorari denied 304 U. S. 581, on appeal to the tax court by taxpayer, there was no hearing, there was no evidence, there was no stipulation of facts, but there was a stipulation filed in the tax court that there was a deficiency for the year 1922 of a certain sum and

that for 1923 there was an over-payment of a certain sum, and judgment was entered accordingly by the tax court. Subsequently, the taxpayer made certain claims for refund which were rejected and filed suit to recover in the Court of Claims. That court in upholding the plea of res adjudicata by the United States stated:

> "That the decision of the Board of Tax Appeals became res adjudicata not only as to such matters as were submitted to the Board but as to all other matters with reference to the taxes for those two years that might have been presented—that the form of the stipulation was such that it must be presumed that all matters of controversy between the parties were covered and disposed of by the judgment."

In the instant case; therefore, it must be presumed by reason and logic on the sole issue in the case that all matters were disposed of by the tax court's judgment.

To the same effect is **Harding v. Harding**, 198 U. S. 317, 334 et seq.

In **Swift & Co. v. United States**, 276 U. S. 311, there was no stipulation of facts filed, no evidence presented and a consent decree was entered by stipulation and the court on the same reasoning upheld the consent decree. See also **Nashville, Chattanooga & St. Louis Railway Company v. United States**, 113 U. S. 261, 266, 267, and **United States v. Parker**, 120 U. S. 89, 95, 96.

In **Urbino v. Puerto Rico Railway, Light and Power Co.**, 164 Fed. 2, 12 (1 C. A.), it was held that a consent decree entered pursuant to a stipulation wherein plaintiffs were awarded unpaid minimum wages but no liquidated damages, constituted an effective bar to a subsequent action by the same parties for liquidated damages only. A similar ruling appears in **Backus v. United States**, 59 Fed. 2 242 (Ct. Cl.). It is evident therefore that the effect of a consent decree by confession is much more far reaching and em-

bracing than the narrow limits which the United States claims, and this is especially true where there is only one issue in the case that was previously decided.

Consent decrees have been enforced in practically all of the circuits of the Court of Appeals throughout the United States. In **Continental Petroleum Co. v. United States**, 87 Fed. 2 91, 94 (10th), Certiorari denied 300 U. S. 679, res adjudicata was upheld on a consent decree, citing Tait v. Western Maryland. To the same effect is **Woods Bros. Construction Co. v. Yankton County**, 54 Fed. 2 304, 306 (8th); **United States v. Radio Corporation of America**, 46 F. Supp. 654, 655, 656, appeal dismissed 318 U. S. 796. In the last mentioned case, the court held it to be a judicial act and said:

> "Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the government the defendants are entitled to set them up as a bar to any attempt by the government to litigate the issue raised in the suit . . ."

To the same effect is **Rector v. Suncrest Lumber Co.**, 52 Fed 2 946, 948 (4th C. A.); **O'Cedar Corporation v. F. W. Woolworth**, 66 Fed. 2 363, 366 (7th). In **Snell v. Turner Lumber Co.**, 285 Fed. 356, 358 (C. A. 2), in previous litigation a consent decree was entered and subsequently a new suit was brought for future profits which it was contended was not dealt with by the consent decree. The court held that the action was founded upon the same contract, upon the same breach of action and that the decree in the former case being by consent did not take away from the effectiveness as being binding and conclusive just as it would be after trial on the merits.

In **Ansara v. Regan**, 276 Mass. 586, where a consent judgment had been entered and a subsequent suit was filed, the court upheld res adjudicata saying:

> "If, by their agreement, after litigation has been entered upon they put the result in the form of a judgment they henceforth are as much bound by the legal effect of the judgment as if it were the outcome which a court would have reached had the issues disclosed by the pleadings been fully tried and decided . . . They cannot go behind it with regard to an issue disclosed by the pleadings. They must see to it when they agree upon the judgment that issues disclosed by the pleadings intended to be left undecided are excluded from its binding effect."

This most pertinent pronouncement fits the instant case. The United States is attempting to go behind its stipulation and judgment in again trying to litigate the only issue disclosed by the pleadings which, of course, under the above decisions cannot be done. The latter case was cited and applied in **Macheras v. Syrmapolous**, 319 Mass. 485, 486. Similar rulings will be found in **Pick Mfg. Co. v. General Motors**, 80 Fed. 2 639 (C. A. 7th); **Bullard v. Commissioner**, 90 Fed. 2 144, 147 (7th), reversed on other grounds, 303 U. S. 297. See also **Freeman on Judgments**, 5th Edition, 1925, Volume 2, pages 1395, 1396; **50 Corpus Juris Secundum, Judgments**, paragraphs 629, 630; **3 American Jurisprudence, Judgments**, paragraph 458; **Restatement of the Law of Judgments**, sec. 68, pp. 299, 304.

Therefore, it is perfectly obvious that the conclusive effect of a judgment by consent cannot be disputed on the ground that the parties intended to leave undecided an issue disclosed by the pleading unless the judgment provides in express terms that such issue be excluded.

We respectfully submit that for this court to rule otherwise would be in effect an overruling of all of the numerous cases decided to the contrary, some of which we have cited above, and we respectfully submit that neither reason nor logic nor the purpose of the res adjudicata rule

are in harmony or consistent with the United States contention.

III.

The Stipulations Entered in the Tax Court Were Not Compromise Stipulations and the Judgments Entered Thereby Were Consent Judgments by Confession, on the Merits of the Causes.

The stipulations entered into and filed in the Tax Court were not compromise settlements. There was no agreement made that a lesser tax should be paid than that assessed by the Commissioner. It provided for no compromise on the sole issue before the Tax Court. The taxpayer in the instant case had appealed from the taxes assessed by the Commissioner on the depreciation basis set up by the Commissioner and as the basis of his appeal to the Tax Court alleged the basis of depreciation to be Eight Hundred Sixty Thousand Dollars ($860,000.00). As a consequence there was only one thing for the Tax Court to decide, what was the basis of depreciation. Once that point was decided, then the deduction for depreciation was a matter of calculation. Therefore, when the United States admitted that there were no taxes due for the years in question, it admitted that the allegations in the petition to the Tax Court of the basis of depreciation were correct so that these stipulations mentioned are in no sense to be construed or could they be possibly construed as a compromise settlement.

A distinction should be drawn between compromise stipulations and judgments entered thereon by consent and consent judgments such as were entered in the instant case. In the compromise settlement cases, nothing is decided or determined because the compromise is based upon neither a fact alleged in a taxpayer's petition, or the Commissioner's answer. A compromise is a settlement by mutual concessions. In the instant case there were no

mutual concessions. There was a cold bald admission and confession which settled the entire controversy on the sole issue in the case. This court recognizes this fact in **D. A. Schulte, Inc., v. Gangi**, 328 U. S. 108, 114, which involved a suit for liquidated damages under the Fair Labor Standards Act, wherein the court stated in a footnote:

> ". . . We think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises between parties."

It would seem that this court has recognized the distinction between compromise stipulations in which consent judgment results and a consent judgment entered by confession as in the instant case where there was no compromise. It is interesting to note that this court in **Fidelity National Bank v. Swope**, 274 U. S. 123, 132, in discussing judgments on a question of res adjudicata said:

> "While ordinarily a case of judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function . . . Whenever the law provides a remedy enforceable in the courts according to the legal course of legal procedure and that remedy is pursued, there arises a case within the meaning of the constitution whether the subject of litigation be property or status. Tutan v. United States, 270 U. S. 568."

Therefore the judgments of the tax court in the instant case was the pursuit of a remedy and a case of litigation within the meaning of the constitution. The United States asserts in its brief that the Commissioner of Internal Revenue has consistently assumed that decisions entered on stipulations affect only the particular taxable years involved. Such an assumption is entirely unwarranted when the decisions which we have quoted above have been given

their effect. There may be some basis for such an assumption where a compromise settlement or stipulation is entered into and a consent judgment entered thereon, but that is not the instant case. We have pointed out the distinction between compromise stipulations and consent judgments entered thereon and the type of stipulation entered into in the instant case above. The United States in its brief has cited certain court decisions and Tax Court decisions where consent judgments were held not to be res adjudicata. But when the cases cited are analyzed they will be found not to be comparable in fact to the instant case. Notwithstanding certain unqualified statements made in **Fruehauf Trailer Co. v. Gilmore,** 167 Fed. 2 324 (10th); **Lawrence Manufacturing Co. v. Janesville Cotton Mills,** 138 U. S. 552; **Gutter v. Arlington Casket Co.,** 255 Mass. 52; **Harding v. Harding,** 197 U. S. 317; **Wadham v. Gay,** 73 Ill. 417;[1] **Gay v. Parport,** 106 U. S. 679,[2] all cited by the United States in its brief; these cases do not support the rule that the mere fact that a judgment was entered by consent prevents its operation as res adjudicata. In the Fruehauf Trailer case, the Lawrence case and the Cutter case, the decision does not require such a ruling. As was quoted in **Harding v. Harding,** 198 U. S. 317, which distinguished Wadham v. Gay and Gay v. Parport, some of these cases involved no problem of res adjudicata at all, but dealt with the power of a court to review a judgment on direct or collateral attack, or with the power of a court of equity to invalidate a decree on the ground of fraud or collusion, as was the case in **Cutter v. Arlington Casket Co.,** supra, or to enforce an incomplete decree because to do so would be inequitable as in **Lawrence Mfg. Co. v. Janesville Cotton Mills,** 138

1 **Wadham v. Gay,** 73 Ill. 415, was later distinguished in First National Bank v. Whitlock (1945), 327 Ill. App. 127, 63 N. E. 2d 659, on the ground that it did not involve a question of res adjudicata.

2 In Gay v. Parport, 106 U. S. 679, the court appropriated the language used in Wadham v. Gay, 73 Ill. 415, involving equitable relief on an incomplete equity decree.

U. S. 552, or that it does not conclude an issue not raised or determined in the former proceeding as in Fruehauf Trailer v. Gilmore, supra, where there was a compromise consent judgment. This last mentioned case does not support the proposition that a consent judgment never can be res adjudicata, because its holding is supported by the doctrine that the question of negligence was never litigated in the former suit or by the rule that the seller was not a party or privy to the former suit and hence is not bound by the judgment. In **Stanback v. Robertson**, 183 Fed. 2 889 (4th Circuit), cited by the United States, the court held that the precise issue in the case before it had not been previously adjudicated and further held that the applicable law had been changed by a supervening decision of the Supreme Court. In **Trapp v. United States**, 177 Fed 2 1, cited by the United States, there was a compromise agreement of the parties and the court in that instant saw the distinction between compromise settlements and stipulations and such as appear in the instant case. In **Hartford Empire Co. v. Commissioner**, 137 Fed 2 540, cited by the United States, a stipulation was filed agreeing to a deficiency and the court said at the top of page 542 that the cost was not an issue in the earlier proceeding, as the previous judgment had been entered on a compromise stipulation. In **Blaffer v. Commissioner**, 134 Fed. 2 389 (5th Circuit), cited by United States, a gift tax case, there was a stipulation entered and filed that the taxpayer was entitled to five exclusions on five gifts under the revenue act. Subsequently, the taxpayer made other gifts and contended that the tax assessed by the second set of gifts should be controlled by the decision in the first case. The court held that they were different gifts, different in number and that the previous decision of the board was not res adjudicata as to the issue in the present case, which was a wholly different cause of action involving new gifts made in subsequent years. In **Argo v. Commissioner**, 150

Fed. 2 67 (5th Circuit), certiorari denied 326 U. S. 762, cited by the United States, the court held that the controlling facts of identity in the instant case were not the same as in the former case and therefore res adjudicata did not apply. In **Travelers Insurance Co. v. Commissioner**, 161 Fed. 2 93 (2nd Circuit), certiorari denied 332 U. S. 766, cited by United States, the court ruled that transferee liability was not an issue in the previous case, and therefore was not res adjudicata. In **Commissioner v. Texas Empire Pipe Line Co.**, 176 Fed. 2 523 (10th Circuit), cited by the United States, the court held that the same question of basis for depreciation presented in the former proceeding before the Tax Court on computation of deficiency under Rule 50 of the Tax Court the Commissioner was bound by collateral estoppel upon authority of the Sunnen Case, 333 U. S. 591, the conditions being the same. In **Burford Toothaker Tractor Co. v. Commissioner**, 192 Fed. 2 663, cited by the United States, Tax Court held compensations payable in 1935, '36 and '37, were reasonable, and further held such decisions were not a bar to unreasonable compensations for the years 1941, '42 and '43, as economic conditions had changed requiring different facts and different evidence, citing the Sunnen Case, supra, in support. In **Cory v. Commissioner**, 159 Fed. 2 391 (3rd Circuit), cited by the United States, the court held that the Tax Court in four trusts established for various members of his family the income was taxable against the creator of the trust under the doctrine of Helvering v. Clifford, 309 U. S. 331—that was res adjudicata for subsequent years as the same trusts, the same parties and the same issues were before the court and that while each year's claim for taxes was a separate claim that this did not prevent the application of res adjudicata. The court further held in this case that the doctrine of res adjudicata was not rendered inapplicable in the subsequent case merely because the claimant in the prior case did not

present his evidence because the burden of proof was on the Commissioner in the Tax Court, as the parties are not entitled to have a question considered on its merits a second time because they failed to produce all the facts the first time the case is up for decision.

In **Gillespie v. Commissioner**, 151 Fed. 2 903, cited by the United States, the court upheld the plea of res adjudicata by the Commissioner as the same issue was decided in the previous case between the same parties, which was in the prior case that the amount paid to the taxpayer was an annuity and taxable as such, and was not a return of capital, and that that was the identical issue in the case before the court.

In Pelham Hall Co. v. Hassett, 147 Fed. 2 63 (1st Circuit), cited by the United States, the court held that the issue of a tax-free reorganization was not an issue in the previous case nor was it decided in the previous case, and therefore res adjudicata did not apply.

Nor were any of the questions in any of the above cases cited by the United States a question of law, as contended for by the United States. In each of the cases it was a factual issue which the court looked at as to whether or not that factual issue had been determined or not in the previous case. In fact in the very same Tenth Circuit in which the Trapp case, supra, was decided and upon which the United States places such reliance, that very same court two months later in **Martin v. Brodrick**, 177 Fed. 2 886 (10th Circuit), upheld the plea of res adjudicata made by the Commissioner on a previous decision of the Tax Court, citing the Trapp case, supra, in support, which again shows that the Tenth Circuit recognized the **distinction between compromise stipulations and consent judgments, such as exist in the Trapp case and the situation presented in the Martin case**, supra.

In **Lawrence v. Janesville Cotton Mills Co.**, 138 U. S. 552, cited by United States in the first suit brought by the plaintiff, against a manufacturing company, a consent decree was entered restraining the defendant from using a label with plaintiff's trade-mark thereon. Subsequently the same plaintiff brought a second suit to restrain the defendant Janesville Cotton Mills, who was a successor to the original defendant, from using this trade-mark and to enforce the former decree. However, in another case, **Lawrence Mfg. Co. v. Tenn. Mfg. Co.**, 138 U. S. 537, it had been held in the meantime that the plaintiff was not entitled to the exclusive right to use this trade-mark; therefore the consent decree was held to be erroneous, the court holding that since it had been decided that since the consent decree was entered that the plaintiff was not entitled to the exclusive use of the trade-mark, that the issue was not res adjudicata. This was proper as there had been a change in the intervening law under the doctrine of Sunnen case, supra.

Volunteer State Life Insurance Co. v. Commissioner, 35 B. T. A. 491, reversed on other grounds 110 F. 2d 879. Certiorari denied 310 U. S. 636, cited by the United States. The Board of Tax Appeals decided that petitioner had overpaid his income taxes for 1928 in a certain amount on the basis of certain issues presented to them. Thereafter on appeal in the Circuit Court of Appeals pursuant to a stipulation the judgment of the Board was reversed and thereafter, pursuant to a compromise stipulation of the parties that petitioner had overpaid its income tax in a lesser amount than that which the Board had previously awarded, the Board entered its decision pursuant to the stipulation for the lesser amount. Therefore the stipulation in that case was a compromise stipulation and a consent judgment was entered upon that basis.

Riter v. Commissioner, 3 T. C. 301, cited by the United States. The Commissioner had assessed deficiencies on

certain gifts. An appeal was made to the Tax Court and a compromise stipulation filed in that court. It was agreed that the Tax Court might enter a judgment for overpayment in a much lesser amount and the Tax Court entered its consent judgment accordingly. In subsequent litigation of additional gifts made in later years the plea of res adjudicata was set up and the tax court held that it was not res adjudicata.

The distinction between all of the above cases cited by the United States in its brief is obvious. Practically all of the cases cited were consent judgments, which were not held to be res adjudicata, were compromise settlement cases where nothing was decided by the judgment of the court, and despite the brief of the United States to the contrary the facts in the instant case show that the stipulation entered into herein was not a compromise settlement and therefore none of the above cases are in point.

IV.

The Consent Judgments Entered by the Tax Court Are Not Contracts, Nor Is the Principle of Res Adjudicata Affected by the Fact That Different Tax Years Are Involved, as Alteration of the Law in This Respect Is for the Law-Making Body and Not the Courts.

One of the cases strongly relied upon by the United States in its brief is **Volunteer State Life Insurance Co. v. Commissioner**, supra. In that case the Board held in denying res adjudicata that a consent decree was not a judgment of the court but was a contract between the parties entered into of record with the court's consent. That pronouncement is directly contrary to all fundamental principles of contracts, as in a compromise settlement and a consent decree entered thereon, all the fundamental elements of a contract are non-existent.

In fact this court in **United States v. Swift & Co.**, 286 U. S. 106, 115, at page 462, expressly held that a consent judgment was not a contract in this language saying:

> "We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."

The court further held at page 119:

> "The injunction whether right or wrong is not subject to impeachment in its application to the conditions that existed at its making."

Therefore, it will be plainly seen that the statement of the Board in Volunteer Life case, supra, is directly opposite to the ruling of this court and therefore should be given no consideration.

The United States again urges the court to consider the fact that the instant case involves different tax years and that the ultimate fact was not admitted in the stipulations filed in the Tax Court. It is true that the instant case involves different tax years, but it is not true that the ultimate fact was not decided by the consent judgments of the Tax Court. Where there is only one fact in issue before the Tax Court and the United States has admitted by stipulation that there are no taxes due under that issue then by the consent judgment entered by virtue of the confession there has been a judgment upon the merits as will be noted from the various decisions that we have cited heretofore.

This court in **City of New Orleans v. Citizens' Bank of Louisiana**, 167 U. S. 371, 395, et seq., wherein this same point was urged, as in the instant case stated:

> "No principle of law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the

reasons upon which it was based were sound or not and even if no reasons at all were given, the judgment imports absolute verity and the parties are forever estopped from disputing its correctness . . . "The estoppel extends to every material allegation of statement which having been made on one side and denied on the other was at issue in the cause and was determined therein . . . "It follows then that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were taxes for other years does prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

Subsequently this court in **Commissioner v. Sunnen**, 333 U. S. 591, made the identical same pronouncement in somewhat different language. The United States urges upon the Court the fact that the Commissioner had always assumed that what they are now urging upon the Court was law. The rule of res adjudicata is based upon public policy requiring the ending of litigation and it is not dependent upon the parties' knowledge of their legal rights. In **Guettel v. United States**, 95 F. 2, 229, 232, certiorari denied 305 U. S. 603, the court in discussing this doctrine said:

"The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law making body rather than the courts. Tait v. Western Maryland Railway Co., 289 U. S. 620 . . . The same public policy which gives rise to the rule should, we think, prevent its applicability being made dependent upon the knowledge or lack of knowledge of the parties as to their legal rights. Moreover,

while a judgment upon the merits may be set aside for equitable reasons in a direct proceeding brought for that purpose, it may not be impeached collaterally."

As the instant case is a proceeding at law for the recovery of taxes, the United States cannot attack the judgments in the Tax Court collaterally in this proceeding. Nor does the assumption of the Commissioner on what he thought the law was, change the public policy of the law of res adjudicata. There is some basis for the Commissioner's assumption that that is the law where consent judgments are entered upon compromise stipulations but we unhesitatingly assert that it is not the law on confession stipulations and consent judgments entered therein as we have demonstrated by the numerous cases cited above.

As to the matter of public policy which the United States urges upon the Court, that same argument was presented to this court in the **City of New Orleans v. Citizens' National Bank of Louisiana**, supra, the court saying:

"The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law making, and not the judicial department."

This court then went on to discuss the fallacy of the argument advanced and stated that if that argument prevailed:

"Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived the sanctity of the thing adjudged; for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

We can find no better words to answer the argument advanced by the United States in this respect than that which we have quoted above.

The United States cites Cromwell v. Sac, 94 U. S. 351, 356, as authority for its position that the ultimate fact was not adjudged in the previous tax court proceeding. In that case consent judgment entered upon a stipulation of confession was not present and therefore that phase of the case is not applicable for consideration. What the court did hold in that case was that the question whether the plaintiff was a bona fide holder of the tax coupons for value before maturity had not been an issue in the previous case nor was it presented. In fact in that case the court plainly stated:

> "But where the second action by the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

As the only issue in the instant case was the ultimate fact of the basis for depreciation under the pronouncement of this court in **Cromwell v. Sac**, supra; **City of New Orleans v. Citizens' Bank of Louisiana**, supra, and **Commissioner v. Sunnen**, supra, this court should do naught else but reaffirm those decisions.

The United States further in its brief constantly uses the word "litigating" and cites the Sunnen case, supra, to the effect that the ultimate issue was not actually litigated. Obviously what they are attempting to get this Court to rule is that the ultimate fact must have been actually tried before the court before it can be res adjudicata. There was no necessity for further litigation because by the very fact the appeal to the tax court was on the sole

issue on the basis of depreciation and the resulting computation of the tax thereon, when that tax is admitted and confessed not to be due they confess the basis of the appeal and there is no necessity of further litigation; litigation does not mean the actual trial of a dispute. It is a dispute at law involving pleadings, trial and judgment; when the necessity of trial is dispensed with by confession of the fact in issue, then the court exercises its judicial function and enters judgment accordingly on the merits. Were the law otherwise, then the decisions and phrases as to precluding "redundant litigation of the identical question" in many of the decisions of this court quoted above would be meaningless and would afford relief to neither the United States or taxpayers. The very language in the Sunnen case and the other cases above on the effect of consent judgments forecloses such a warped construction of the law. In **Commissioner v. Sunnen**, supra, at page 598, the court plainly states that collateral estoppel operates only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered, and that

> "Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been rendered and decided at that time."

When the United States admitted that there were no taxes due by their confession in the stipulation, there was no other issue to be tried, the lawsuit was ended because the basis of depreciation on which taxes are due was the only issue in the case by their own admission in the stipulation of fact filed in the District Court. It would be senseless and against all common sense and reason after such a stipulation by confession was entered into for the Commissioner to go to the Tax Court on that same proceeding

and ask to have the only issue the basis of depreciation heard by the Tax Court because by their confession they had already admitted that fact and such would be contrary to Rule 31 (b) of the Tax Court, 26 U. S. C., Section 1111, wherein that rule in the last three lines thereof states:

> "That the court would not receive evidence tending to qualify, change or contradict any fact properly introduced to the record by stipulation."

The Tax Court would not have permitted the Commissioner to have introduced any evidence controverting the basis of depreciation upon the deduction calculated originally by taxpayer in its return because to do so would controvert the very words of their stipulation. For these reasons it is respectfully submitted that the argument of the United States in this respect is without merit.

CONCLUSION.

In view of the many decisions of this court as well as lower courts as cited above, it is respectfully submitted that this court should distinguish the distinction between compromise stipulations and consent judgments entered thereon and stipulations by confession and consent judgments thereon, and thereby affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A.

Tax Court Rules, 26 U. S. C., Sec. 1111

Rule 31. (a) * * *

(b) Stipulations. The parties, by stipulating in writing filed with the Court or presented at the hearing, may agree upon any facts involved in a proceeding. Stipulations filed need not be formally offered to be considered in evidence. Written stipulations shall be filed in duplicate. Duplicates of exhibits appended to the stipulation need not be provided unless requested. Both parties shall endeavor to stipulate evidence to the fullest extent to which either complete or qualified agreement can be reached. If all evidence lending itself to stipulation, as, for example, entries or summaries from books of account and other records, has not been stipulated at the time the notice of the date of the hearing is mailed, then the party desiring to introduce such evidence shall confer with his adversary or opposing counsel promptly after receipt of the hearing notice in an effort to stipulate such facts. Any objection to the relevancy of a particular part or all of a stipulation should be noted in the stipulation, but the Court will give consideration to any objection to the relevancy of stipulated facts made at the hearing. The Court may set aside a stipulation where justice requires, but will not receive evidence tending to qualify, change, or contradict any fact properly introduced into the record by stipulation.

(c) * * *

(d) * * *

(e) * * *

(f) * * *

(g) * * *